SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
MAY 6 1968
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 1408

MODERN PLASTIC MACHINERY CORP.,

Petitioner,

vs.

FRANK W. EAGAN & COMPANY and
WILLIAM H. WILLERT,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

ERNEST G. MONTAGUE,
Attorney for Petitioner,
122 East 42nd Street,
New York, N. Y. 10017.
Tel. (212) 986—4620

ACKERMAN PRESS, Phones BO 9-7107-8

TABLE OF CONTENTS

	PAGE
Opinions of the Courts Below	1
Jurisdiction	2
Question Presented	2
Statutory Provisions and Procedure Rule Involved	3
Statement of the Case	3
Reasons For Granting the Writ	4
Argument	5
Conclusion	7
Appendix A	8
Appendix B	9
Appendix C	11

CASES CITED

Borg-Warner Corp. v. Mall Tool Co., 220 F. 2d 803 (7th Cir. 1955), cert. denied, 349 U. S. 946	5
Hazel-Atlas Glass Co. v. Hartford-Empire Co., 322 U. S. 238 (1944)	4, 5

STATUTES

35 U. S. C. 101	3
35 U. S. C. 102	3
35 U. S. C. 103	3
35 U. S. C. 282	3
Rule 52, F.R.C.P.	3

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. .....

MODERN PLASTIC MACHINERY CORP.,
Petitioner,

vs.

FRANK W. EGAN & COMPANY, and
WILLIAM H. WILLEBT,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

To the Honorable
the Chief Justice and Associate Justices
of the Supreme Court of the United States:

Your Petitioner, Modern Plastic Machinery Corp., prays that a writ of certiorari should issue to review the order of the Court of Appeals for the Third Circuit entered on April 26, 1968, denying a motion for vacating or modifying the judgment and ordering a rehearing in the District Court for a new trial on the validity of claims 1 and 4 of the patent in suit.

Opinions of the Courts Below

(a) Opinion of the District Court reported at 260 F. Supp. 22 (Appendix A of the Petition for Writ of Certiorari to the United States Court of Appeals for the Third

Circuit, Docket No. 1384—hereinafter referred to as "Pet. Cert. 1384").

(b) Opinion of the United States Court of Appeals for the Third Circuit in Frank W. Egan & Company and William H. Willert, v. Modern Plastic Machinery Corp., No. 16,446 dated December 29, 1967, reported in 387 F. 2d 319 (1967). Copies of the Opinion, the Judgment and the order denying the Petition for Rehearing are appended to Pet. Cert. 1384, Appendices B, C and D thereof.

(c) The order denying the motion for vacating or modifying the judgment and ordering a rehearing in the District Court for a new trial is appended to this petition (Appendix A).

Jurisdiction

1. This is a suit arising under the Patent Laws of the United States, Title 35; 35 U.S.C. § 281; 28 U.S.C. §§ 1338 (a) and 1400 (b).

2. The jurisdiction of this Court is invoked under Title 28, Section 1254 of the United States Code.

3. The date of the order which petitioners seek to have reviewed is April 26, 1968.

Question Presented

The principal and sole question presented is the validity of claims 1 and 4 of the Willert patent No. 2,734,226. The Court of Appeals for the Third Circuit found validity of claims 1 and 4, remanding the case to the District Court for determination of the infringement issue. A motion for a new trial, vacating or modifying the judgment in the

above identified case or ordering a rehearing in the District Court on the validity of claims 1 and 4 of the patent in suit based upon newly presented evidence was denied by the Court of Appeals without opinion.

Statutory Provisions and Procedure Rule Involved

This case involves Sections 101, 102 and 103 and 282 of Title 35 of the United States Code, and Federal Rule of Civil Procedure Number 52, all of which are set forth in Appendix F of Pet. Cert. 1384.

Statement of the Case

The statement of this case prior to the motion for a new trial is set forth in the Pet. Cert. 1384, pages 3 *et seq.*

Subsequently a motion for vacating or modifying the judgment or ordering a rehearing in the District Court on the validity of Claims 1 and 4 of the Patent in Suit was denied, which motion was properly supported and based on the newly submitted U. S. Patent No. 1,533,191, to W. Kaiser et al. (Appendix B herein) on applicable law clearly set forth in a Memorandum of Law attached to said motion.

It will be shown, that said Kaiser et al. patent completely *anticipates on its face* the sole inventive "concept" of the Willert patent in issue, as defined in its opinion by the Court of Appeals for the Third Circuit.

Willert claims that he was the first to teaching plasticizing of plastic material by means of adjustable back pressure exerted upon a reciprocating rotating screw.

W. KAISER ET AL. TEACH BEYOND ANY DOUBT THE PLASTICIZING OF PLASTIC MATERIAL BY MEANS OF ADJUSTABLE BACK PRESSURE EXERTED UPON A RECIPROCATING ROTATING SCREW.

Respondents did not reply to said motion on its merits and confined themselves to a characterization of said motion as another petition for rehearing in a letter to the Court of Appeals (Appendix C herein), in spite of the presentation of a new patent which voids any claim for a new concept of invention allegedly contributed by Willert.

The Court of Appeals denied the motion without granting a hearing and without rendering an opinion.

If it is taken into consideration that a patent is a type of monopoly enjoyed by the patentee, public interest dictates that any patent requires careful examination concerning the requirements for patentability.

Reasons for Granting the Writ

In addition to the reasons set forth in Pet. Cert. No. 1384 pages 4-6, this petition presents a question of law in cases of newly presented evidence, particularly if the patentee and inventor himself was not in a position to define his inventive contribution, when called upon to state his invention to the District Court, and also if newly presented evidence in a patent case, burdened with the heavy public interest, was required to be presented because *respondents shifted their position* before the Court of Appeals, and alleged a new "concept" of invention for a feature which was recognized and conceded by respondents as a teaching of the prior art in the proceeding in the District Court as correctly reflected in the opinion of the District Court.

In *Hazel-Atlas Glass Co.* v. *Hartford-Empire Co.*, 322 U. S. 238 (1944), this Court permitted the introduction of "newly presented evidence" to reverse, years later, a prior Court of Appeals judgment of patent validity, on the basis that the prior judgment was based upon a new shift in position by the plaintiff patent owner for the first.

time before the Court of Appeals, and upon which new shift in position the Court of Appeals held the patent valid.

It was this shift in position by the plaintiff *for the first time* before the Court of Appeals in *Hazel-Atlas*, which, as this Hon. Court held, permitted the defendant there to bring in at that late date the "newly presented evidence" to meet this shifted position, which "newly presented evidence" was not required in the District Court in the light of plaintiff's original position.

The last doubt whether this writ should be granted, is removed, if it is considered that in *Hazel-Atlas* this Court further stated:

> "This matter does not concern only private parties. *There are issues of great moment to the public in a patent suit*" [citing cases]." (at p. 246) (Italics added)

The consideration to be given by the Court of Appeals on these motions is merely one of *prima facie* consideration, the full finding reserved for the District Court to fully evaluate the new evidence. *Borg-Warner Corp.* v. *Mall Tool Co.*, 220 F. 2d 803 (7th Cir. 1955), cert. denied, 349 U. S. 946; *cf. Hazel-Atlas, supra.*

Finally, the Court of Appeals issued a mandate to the District Court to adjudicate the issue of infringement. How can the District Court discharge this duty, if the *entire* prior art is to be considered in order to determine the scope of the claims?

Argument

It has been stated in the Pet. Cert. No. 1384 that it was one of the *Findings of Fact* by Judge Wortendyke, in the District Court, according to which plaintiffs (respondents herein) themselves in a footnote in their brief (p. 49b) state:

> "The structure for applying an adjustable back pressure to a reciprocating screw was then [1950 and 1951] available (e.g. Wiedmann (D-8), Fig. 1, valve 10 and associated hydraulic circuitry) *to any plastics injection molding machine designer* who wanted to incorporate that feature in his machines." (Italics added.)

On the other hand, respondents appreciated, that this *concession* amounted to the end of their rope, since all other elements of the Willert patent were also conceded as old, and respondents had to resort to a *new or novel concept*, which was advanced only in their Reply Brief before the Court of Appeals and yet, not even in their Brief on Appeal. This new *concept* required a *withdrawal of their previous concession*, namely that Wiedmann amounts to anticipation of the Willert invention, and advancing now a new theory, according to which *Wiedmann* is *not* an anticipation of the Willert invention, but rather that the novel *concept* resides in the use of adjustable back pressure, as known *per se* by Wiedmann, to plastic material for the purpose of plasticizing the same.

It should be emphasized that respondents put a cloud over the alleged invention of Willert and did not come forward before the District Court as to what actually Willert's invention allegedly amounted to.

It is, however, strange and cannot be explained that the Court of Appeals accepted the alleged *novel concept*, completely neglecting and ignoring *respondents' admission of anticipation* before the District Court, which concession undoubtedly contributed to the conclusions of law set forth by the District Court.

It is for this reason, that the Kaiser et al. patent No. 1,533,191 (App. B) had to be presented at this late date, in order to provide evidence that this last retreat by respondents, namely that Willert's invention stands for

applying of adjustable back pressure to a reciprocable rotating screw for plasticizing of plastic material, is likewise part of the prior art and *not an invention of Willert.* Even this last retreat by respondents is clearly met *on its face* by the newly presented Kaiser et al. patent.

Conclusion

It has been emphasized in the Pet. Cert. No. 1384 that this litigation is of interest to the entire plastic industry in view of the present licensees and other parties under threat of litigation, unless they are prepared to accept a license of the Willert patent.

The Court of Appeals erred in the first place, in reversing the judgment arrived at by the District Court, in finding the claims 1 and 4 of the Willert patent valid and the Court of Appeals erred again in denying the motion and, in the light of the Kaiser et al. patent, should have remanded the case to the District Court for a further consideration of the Kaiser et al. patent, particularly since respondents caused the late presentation of the Kaiser et al. patent by their shift of position before the Court of Appeals.

Reversing the Court of Appeals, petitioner's motion should be granted.

Respectfully submitted,

Ernest G. Montague,
Counsel for Petitioner,
122 East 42nd Street,
New York, N. Y. 10017.
Tel. (212) 986—4620

APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 16,446

FRANK W. EGAN & COMPANY and
WILLIAM H. WILLERT,
Appellants,

vs.

MODERN PLASTIC MACHINERY CORP.

Present: KALODNER and STALEY, *Circuit Judges*, and SHERIDAN, *District Judge*

Upon consideration of appellee's motion for vacating or modifying the judgment or ordering a rehearing in the District Court for the District of New Jersey on the validity of Claims 1 and 4 of the patent in suit, and the letter by counsel for appellant in answer thereto, both in the above-entitled case,

It is ORDERED that appellee's motion be and hereby is denied.

By the Court,

KALODNER
Circuit Judge

Dated: April 26, 1968

APPENDIX B

(See opposite ☞)

April 14, 1925. 1,533,191

W. KAISER ET AL.

PRESS FOR PLASTIC MATERIALS

Original Filed April 27, 1923

UNITED STATES PATENT OFFICE.

Fig. 1

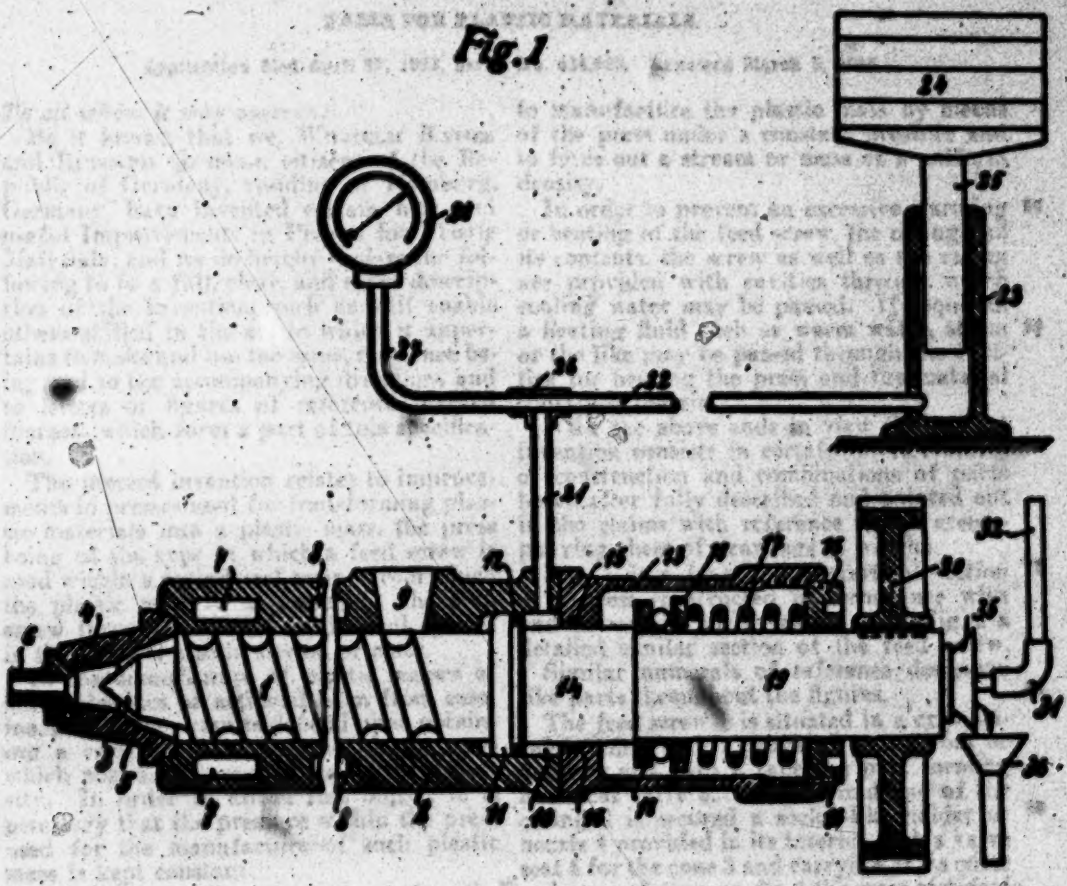
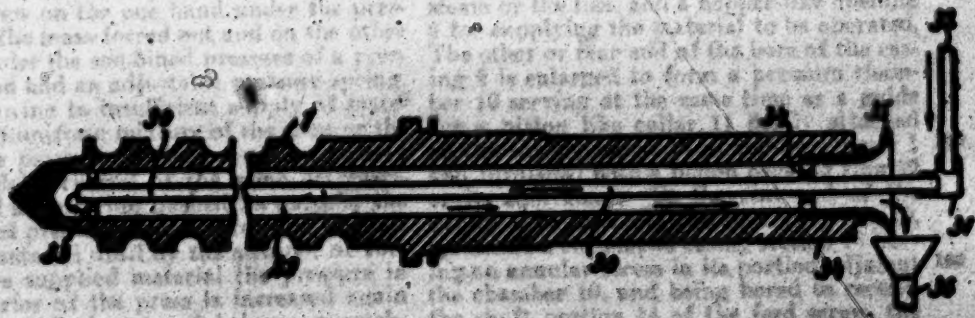


Fig. 2



INVENTORS

William Kaiser

Wilhelm Kaiser

By Richards & Geier

Attorneys

Patented Apr. 14, 1925. 1,533,191

UNITED STATES PATENT OFFICE.

WILHELM KAISER AND RUDOLPH GARDELA, OF HAMBURG, GERMANY, ASSIGNORS TO ADOLF BÄHR, OF HAMBURG, GERMANY.

PRESS FOR PLASTIC MATERIALS.

Application filed April 27, 1922, Serial No. 556,946. Renewed March 7, 1924.

To all whom it may concern:

Be it known that we, WILHELM KAISER and RUDOLPH GARDELA, citizens of the Republic of Germany, residing at Hamburg, Germany, have invented certain new and useful Improvements in Presses for Plastic Materials; and we do hereby declare the following to be a full, clear, and exact description of the invention, such as will enable others skilled in the art to which it appertains to make and use the same, reference being had to the accompanying drawings, and to letters or figures of reference marked thereon, which form a part of this specification.

The present invention relates to improvements in presses used for transforming plastic materials into a plastic mass, the press being of the type in which a feed screw is used within a cylindrical casing from which the plastic material is forced by the feed screw through a mould or die and ejected in the form of a solid stream or mass.

In the manufacture of plastic masses of horn-substance or artificial horn from casein, satisfactory results depend upon obtaining a complete homogeneous plastic mass which possesses throughout a uniform density. In order to attain this object, it is necessary that the pressure within the press used for the manufacture of such plastic mass is kept constant.

According to the present invention the maintenance of constant pressure is obtained by constructing the front end of the feed screw in conjunction with the outlet end of the cylinder or casing body to act or operate as a valve mechanism, and by setting the feed screw on the one hand under the pressure of the mass forced out and on the other hand under the combined pressure of a pressure-fluid and an adjustable pressure-spring. When owing to insufficient supply of material, non-uniform mixture of the same or the like, the pressure in the press, particularly at the delivery end of the same decreases, the feed screw being pushed forward by the combined pressure-means, throttling the exit of the material until by the advance of furthermore supplied material the pressure in the interior of the press is increased again and the desired state of balance re-established. When the pressure has become too high the adjustment takes place in a reversed manner. Thus it is rendered possible to manufacture the plastic mass by means of the press under a constant pressure and to force out a stream or mass of a uniform density.

In order to prevent an excessive warming or heating of the feed screw, the casing and its contents, the screw as well as the casing are provided with cavities through which cooling water may be passed. If required, a heating fluid such as warm water, steam or the like may be passed through the cavities for heating the press and the material contained therein.

With the above ends in view the present invention consists in certain novel features of construction and combinations of parts hereinafter fully described and pointed out in the claims with reference to the accompanying sheet of drawings in which:

Fig. 1 is a longitudinal vertical section of a press constructed in accordance with and embodying the invention; and Fig. 2 a detailed similar section of the feed screw.

Similar numerals of reference designate like parts throughout the figures.

The feed screw 1 is situated in a cylindrical casing 2 and is provided at its front or delivery end with a tapering part forming a conical valve 3. To the front end of the casing 2 is secured a socket-like holder or nozzle 4 provided in its interior with a valve seat 5 for the cone 3 and carrying at its outer end a mouthpiece or die 6 the cross sectional area of which corresponds to that of the body of plastic mass to be produced. The casing 2 has in its wall preferably two cavities 7 and 8 for the reception or passage of a cooling or heating medium such as water, steam or the like, and a hopper-like opening 9 for supplying the material to be operated. The other or rear end of the bore of the casing 2 is enlarged to form a pressure chamber 10 serving at the same time as a guide for a piston like collar 11 firmly attached on the shaft portion 14 of the feed screw 1 and furnished with a piston packing ring 12 or its equivalent. To the rear end of the casing 2 beyond the pressure chamber 10, is secured a cupshaped casing section 13 having an annular recess in its portion adjacent the chamber 10, and being bored to receive the shaft portion 14 of the feed screw, the recess being provided with a packing ring 15. In the other, outer end of the casing section 13 is screwed an annular nut 16 through

Patented Apr. 14, 1925. 1,533,191

UNITED STATES PATENT OFFICE.

WILHELM MAINER AND RUDOLPH DANDELS, OF HAMBURG, GERMANY, ASSIGNORS TO ADOLF BARR, OF HAMBURG, GERMANY.

PRESS FOR PLASTIC MATERIALS.

Application filed [illegible] 27, 1923. Serial No. 675,968. Renewed March 7, 1925.

to manufacture the plastic mass by means of the press under a constant pressure and to force out a stream or mass of a uniform density.

In order to prevent an escape of the plastic material between the feed screw, the casing and the outlet-nozzle, as well as the casing are provided with cavities through which cooling water may be passed. If required, a heating fluid such as warm water, steam or the like may be passed through the cavities for heating the press and the material contained therein.

With the above ends in view the present invention consists in certain novel features of construction and combinations of parts hereinafter fully described and pointed out in the claims with reference to the accompanying sheet of drawings in which:

Fig. 1 is a longitudinal vertical section of a press constructed in accordance with the present invention; and Fig. 2 a similar sectional section of the feed screw. Similar numerals of reference designate the same parts throughout the figures.

The feed screw 1 is situated in a cylindrical casing 2 and is provided at its front end with a tapering end forming a conical valve 3. To the front end of the casing 2 is secured a nozzle-like holder or nozzle 4 provided in its interior with a valve seat 5 for the cone 3 and carrying at its outer end a mouthpiece or die 6 the cross sectional area of which corresponds in that of the body or plastic mass to be produced. The casing 2 has in its wall preferably two annular chambers 7 and 8 for the reception or passage of a cooling or heating medium such as water, steam or the like, and a hopper-like opening 9 for supplying the material to be operated. The other or rear end of the bore of the casing 2 is enlarged to form a pressure chamber 10 serving at the same time as a guide for a piston like collar 11 firmly attached on the shaft portion 14 of the feed screw 1 and furnished with a piston packing ring 12 or its equivalent. To the rear end of the casing 2 beyond the pressure chamber 10 is secured a cupshaped casing section 13 having an annular recess in its portion adjacent the chamber 10, and being bored to receive the shaft portion 14 of the feed screw, the recess being provided with a packing ring 15. In the other, outer end of the casing section 13 is screwed an annular nut 16 through

[illegible]

which the reduced portion 19 of the feed screw passes. Between the nut 16 and a thrust bearing 18, resting against the offset or shoulder between the sections 14 and 19 of the feed screw shaft, is placed a cylindrical spiral spring 17 the pressure of which may be adjusted by screwing in or out the nut 16 as required. Motion may be imparted to the feed screw by means of a gear wheel 20 (belt pulley or the like) keyed on the free extremity of the feed screw shaft section 19.

The pressure chamber 10 is in communication with the cylinder 23 of a fluid pressure accumulator by means of pipes 21 and 22 the piston 25 of the accumulator being actuated by a weight or weights 24 to force it downwardly into the cylinder 23 containing the fluid. The pressure existing in the accumulator and pressure chamber is indicated at any time by a gauge 28 connected to the pipes 21 and 22 by means of a pipe 27 and a T fitting 26.

The feed screw 1 and its shaft portions 14, 19 have a central cavity or recess 29 in which is mounted a tube 30 by means of an annular disc 33 and a bush 34 provided in axial direction with holes or passages. The pipe 30 is in communication with a supply pipe 32 by means of an elbow 31 so that any cooling or heating fluid, supplied through the pipe 32, may pass through the tube 30, flow back through the annular space between this tube and the inner wall of the central cavity or bore 29 and discharge through a delivery funnel 35 of the bush 34 into a gutter-pipe 36 or the like.

The tube 30 may either be mounted stationary within the feed screw and revolve in the elbow 31, or it may be fixed in the elbow 31 and rotate in the disc 33 and bush 34.

The function of the improved press is as follows:

The plastic material supplied through the hopper 9 is conveyed along by the feed screw 1 whereby it is kneaded and pressed under the pressure for which the press has been adjusted. The thus treated material is then forced through the annular space between the conical valve body 3 and the valve seat 5 and is finally discharged through the mouthpiece or die 6 in the form of a solid stream. The pressure by which the material is compressed depends on the size of the annular outlet orifice between the cone 3 and the seat 5. By maintaining a certain size of this orifice the material discharged through the die 6 as a stream of plastic mass, has a certain density or compression dependent on the pressure by which the mass is forced out. This pressure is adjusted and controlled in part by means of the pressure accumulator and in part by the adjustable spiral spring. The accumulator, which may be used simultaneously for a plurality of presses supplies all these presses with a uniform pressure which corresponds to the smallest pressure needed. The steps or rates of pressure required for the separate presses are determined and effected by means of the spiral spring 17 which furnishes therefore an additional adjusting pressure.

When for any reason, the pressure of the material in the annular outlet passage between the cone 3 and its seat 5 decreases, the combined effects of the pressure fluid and the adjusting spring will exceed and displace the feed screw axially to the delivery end of the casing, whereby the size of the annular outlet space is reduced. This results in an increase of the pressure in the said annular outlet space whereby the feed screw is pushed back in the opposite direction until the state of balance in pressure is re-established. The feed screw is therefore continuously oscillating in axial direction and tending to maintain the desired pressure in the annular outlet space so that the plastic mass is discharged through the die under a uniform pressure and consequently with a constant compression or density.

By adjusting the cooling water in the cavities 7 and 8, as well as in the feed screw, the temperature in the interior of the press may be controlled as required. Of special importance is the fact that the state of heat of the feed screw can be fully controlled as the temperature can be ascertained at any time by the water running down from the bush-funnel 35.

We claim:

1. A press for extruding plastic material, comprising a casing, and a feed screw rotatable therein characterized by the fact that the front end of the screw in conjunction with the feed screw casing is constructed to form a valve mechanism, and that the feed screw forces the plastic mass out under the combined pressure of a pressure fluid and an adjustable pressure spring.

2. A press according to claim 1 characterized by a feed screw having an inner cavity supplied by inlet and outlet pipe conduits with a medium for cooling or heating the said feed screw.

3. A press according to claim 1 characterized by a feed screw provided with a central bore extending nearly to its front end and having mounted therein an annular disc and a bush serving as supports for a central tube inserted into bore, the said disc and bush having holes for the passage of a temperature modifying fluid supplied through the tube into the bore of the feed screw.

In testimony that we claim the foregoing as our invention, we have signed our names.

WILHELM KAISER.
RUDOLPH GARDELS.

APPENDIX C

(See opposite ☞)

RECEIVED
APR 12 1968

BOSTON
FREDERICK P. FISH
W. H. RICHARDSON
H. L. KIRKPATRICK
ROWLAND V. PATRICK
EDGAR H. KENT
W. R. HULBERT
R. W. FUHLONG
MARTIN A. KIRKPATRICK
WM. W. RYNCH
ERNEST T. LEGATES
WILLIS M. EATMAN
JOHN N. WILLIAMS
C. C. WINCHESTER
ROBERT C. HILLMAN
JAMES B. LAMPERT
GEORGE M. DOHERTY
C. MATTHEW BURTON
THOMAS V. SHURTLEFF

FISH, RICHARDSON & NEAVE
277 PARK AVENUE
NEW YORK, NEW YORK 10017

NEW YORK
AREA CODE 212
826-1050
CHARLES NEAVE
STEPHEN H. PHILBIN
WILMOT N. ATHERTON
JOHN VAUGHAN GROMER
CHARLES H. WALKER
WILLIAM J. BARNES
W. PHILIP CHURCHILL
HARRY R. POPP, JR.
JOHN BEARD
WILLIAM H. KENN
JOHN FARLEY
HENRY J. ZAPPIA
JAMES D. ROCK
JAMES R. WELCH
PAUL J. LUCKERN
HERBERT F. SCHWARTZ
PAUL C. FLATTERY
JOHN A. HOWSON
LOUIS F. REED
CHARLES B. SMITH
FURMAN SHEPPARD
ROBERT B. WHITRIDGE
DONALD E. DEGLING
DAVID W. PLANT
ALBERT E. FEX
JOHN D. TRAMONTINE
LEE C. ROBINSON, JR.
GERALD J. FLINTOFT
ARTHUR A. ANDERSON
PAUL L. BROWN
WILLIAM J. GILBRETH
JAMES F. HAYES
OF COUNSEL
ALEXANDER C. NEAVE
E. CUMMINGS SANBORN

April 11, 1968

Thomas F. Quinn, Esq.
Clerk, United States Court
of Appeals for the Third Circuit
2046 U. S. Courthouse
Ninth & Chestnut Streets
Philadelphia, Pennsylvania 19107

Frank W. Egan & Company and William H. Willert, Plaintiffs (Appellants), v. Modern Plastic Machinery Corp., Defendant (Appellee) - Appeal No. 16,446

Dear Mr. Quinn:

I am counsel for plaintiffs-appellants in the above-captioned appeal, in which this Court's opinion was filed and its judgment entered, reversing the District Court, on December 29, 1967. A petition by defendant-appellee for rehearing was denied on February 1, 1968. By order entered March 22, 1968, issuance of the mandate has been stayed to May 1, 1968.

In the late afternoon of Tuesday, April 9, 1968 there was served on me by counsel for appellee a "Motion for Vacating or Modifying the Judgment in the Above-Entitled Case or Ordering a Rehearing in the District Court on the Validity of Claims 1 and 4 of the Patent in Suit." The notice accompanying the motion specified Monday, April 15, 1968 as the return date.

I have been informed by Mr. Robert Ryan of Messrs. Drinker Biddle & Reath that he conferred this

RECEIVED

APR 12 1958

morning with William J. Brennan of your office. Mr. Brennan advised Mr. Ryan that the panel of Judges sitting on next Monday, April 15, would not hear appellee's motion, and that there was no necessity for counsel for appellants to be present at that time.

I understand further that appellee's motion will be referred to the panel (Staley, Chief Judge, Kalodner, Circuit Judge, and Sheridan, District Judge) which heard and decided this appeal. The motion, which is distinctively hybrid, is in essence a second petition for rehearing, offering nothing new, and rehearsing once more many of the contentions previously made by appellee and rejected by the Court. In addition, the motion seeks to modify the judgment by having included in it a direction to the District Court to reopen.

Appellants firmly believe that appellee's motion is without substance. Because of its similarity to a petition for rehearing, appellants do not propose to file any papers in opposition, unless requested to do so by the Court.

If you believe it appropriate, I would appreciate your sending copies of this letter to the members of the Court to whom copies of appellee's motion papers are submitted.

I am delivering a copy of this letter by hand to appellee's New York counsel today, and mailing a copy to appellee's Newark counsel.

Respectfully yours,

William K. Kerr

WKK:RBM

William K. Kerr

cc - Ernest G. Montague, Esq.
Harry Sommers, Esq.

BY HAND